United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. F. PETERSON,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 4146

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE TERRTIORY OF ALASKA, THIRD DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

Plaintiff in error, C. F. Peterson, was charged in a complaint filed before W. H. Rager, United States Commissioner and ex-officio justice of the peace for Knik Precinct, in the Territory of Alaska, on the 20th day of July, 1922, with unlawfully and wilfully having in his possession intoxicating liquor in violation of the provisions of the Act of Congress approved February 14, 1917, commonly known as the Alaska Bone Dry Law. Thereafter a trial was had before said Commissioner and plaintiff in error was found guilty. An appeal was taken from the judgment of said Commissioner to the United States District Court for the Territory of Alaska, Third Division, and upon a trial before said court the plaintiff in error was again found guilty and sentenced to be imprisoned for a term of nine months in the federal jail at Anchorage, Alaska, and in addition thereto to pay a fine of $900.00, in default of the payment of which he was sentenced to serve one day in the federal jail at Anchorage for each two dollars of the fine unpaid.

ASSIGNMENT OF ERRORS.

First. The Court erred in permitting the witness Mossman to testify, over and against the objection and exception of the defendant, in that said

Court was without jurisdiction to try said defendant upon the complaint filed in said cause, as shown by the bill of exceptions, as follows:

> Mr. RAY.—The defendants object to the introduction of the testimony of the witness for the following reasons:
>
> 1. The complaint on which the defendants are sought to be placed on trial is signed C. W. Mossman,' not in any official capacity. An indictment to be good would have to be signed 'Sherman Duggan, United States Attorney.''
>
> 2. The Court is without jurisdiction to try these defendants in that it is in violation of the rights of the defendants as given by the fifth amendment to the Constitution of the United States providing that no person shall be held to answer for a capital or otherwise infamous crime unless by indictment of a grand jury.
>
> 3. That the Congress of the United States is without authority to pass legislation making the possession of intoxicating liquor an offense.
>
> 4. That the offense sought to be charged in this complaint is not set forth with sufficient certainty to apprise these defendants to which charge they must answer, and the complaint does not state sufficient facts in law to constitute a valid complaint.
>
> The COURT.—The objection is overruled. Defendants allowed an exception. [60]

Second. The Court erred in permitting the witness Mossman to testify, over and against the objection and exception of the defendant, as follows:

> Q. Just go ahead and state what was done there when you met the defendants at that time.
>
> Mr. RAY.—At the time you intercepted the defendants, as you stated in the car, had you a search-warrant?
>
> Mr. HURLEY.—We object to the question, if the Court please, as incompetent.
>
> The COURT.—Objection overruled.
>
> The WITNESS.—I had no search warrant, no, sir.
>
> Mr. RAY.—Have any other process of any kind?
>
> The WITNESS.—No, sir.
>
> Mr. RAY.—The defendants object to the further introduction of the testimony of this witness and any evidence obtained by him as the same was procured in violation of the fourth and fifth amendments to the Constitution of the United States providing that there shall be no illegal and unreasonable searches and seizures, and that a defendant shall not be compelled to give incriminating testimony or further incriminating testimony against himself.
>
> The COURT.—The objection is overruled. Exception allowed.

Third. The Court erred in permitting the witness Mossman to testify as to the ownership of a certain car or automobile, over and against the objection and exception of the defendant, as follows:

Q. And whose car was it?

Mr. RAY.—We object to the question as calling for a conclusion of the witness.

The COURT.—He may answer if he knows.

The objection is overruled. Exception allowed.

Fourth. The Court erred in permitting the witness Mossman to testify, over and against the objection and exception of the defendant, as follows:

Q. And is the contents of this bowl that you have poured from this keg part of the liquor that you found in the car on that day? [61]

Mr. RAY.—We object to the question. The liquor is not yet in evidence; and we object to the conduct of the prosecuting officer in thus making an attempt to introduce certain testimony before the Court has formerly passed upon and admitted such testimony.

Mr. HURLEY.—We will withdraw the question.

The COURT.—I think it was an oversight.

Q. I wish at that time to offer the—

Mr. RAY.—We except to the statement of the Court as not being sufficient under the circumstances which have arisen to correct the error; and we object to the introduction of the kegs and contents for the reason that it is apparent on the testimony of the officer that he acted without process of any kind.

The COURT.—The objection is overruled. Exception allowed.

Fifth. The Court erred in admitting in evidence, over the objection and exception of the defendant a certain bowl and its contents, as follows:

Mr. HURLEY.—I want to offer this bowl and its contents in evidence, taken from Exhibit "A."

Mr. RAY.—Objection on the same grounds. It was an unlawful seizure. Defendant also objects to the jurors acting as witnesses in that certain liquid has been circulated among them by the assistant United States Attorney.

The COURT.—The objection will be overruled. The bowl will be admitted in evidence and marked. Exception allowed.

Sixth. The Court erred in denying the motion of the defendants to strike the testimony of the witness Mossman, to the denial of which motion exception was taken and allowed by the Court, as follows:

Mr. RAY.—The defendants move to strike the testimony of the witness Mossman as to any facts testified by him on the ground that the

said officer acted without process of law, either a search-warrant or warrant of arrest for these defendants, in violation of the constitution rights provided in the fourth and fifth amendments to the Constitution of the United States, and was in effect an illegal search and illegal seizure.

The COURT.—The motion is denied. Exception allowed.

Seventh. The Court erred in permitting the witness Watson to testify, over and against the objection and exception of the defendant, as follows:

Mr. RAY.—Did you have a search-warrant?

A. No, sir.

Mr. RAY.—Any other warrant?

A. No, sir.

Mr. RAY.—We object to the introduction of testimony of this witness now sought to be elicited, on the ground that the same is in violation of the rights of the defendant as prescribed in the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The objection is overruled. Exception allowed.

Eighth. The Court erred in denying the motion of the defendants to strike the testimony of the witness Watson, to the denial of which motion exception was taken and allowed by the Court, as follows:

Mr. RAY.—Defendants move to strike the testimony of the witness Watson the ground that the testimony thus given is based upon a search without warrant of arrest or search-warrant, in contravention of the rights of the defendant established by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The motion is denied. Exception allowed.

Ninth. The Court erred in permitting the introduction of the testimony of the witness Mossman, recalled for further examination, as to conversations had with the defendant Peterson or the defendant Maelhorn at or about the time of the arrest, to the admission of which testimony the defendant objected and duly excepted, as follows:

Mr. RAY.—Well, we object to the introduction of any statements made by the defendant while under arrest.

The COURT.—The objection is overruled. Exception allowed. [63]

Tenth. The Court erred in permitting the witness Green to testify, over and against the objection and exception of the defendants, as follows:

Mr. RAY.—Had you a search-warrant to search an automobile?

The WITNESS.—No, sir.

Mr. RAY.—Defendants object to the introduction of the testimony sought to be elicited from this witness on the ground that it was obtained without authority in law and in violation of the rights of these defendants as established by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The objection is overruled. Exception allowed.

Eleventh. The Court erred in denying the motion of the defendants to strike the testimony of the witness Green, to the denial of which motion exception was taken and allowed by the Court, as follows:

Mr. RAY.—I ask that the witness Green's testimony be stricken on the ground that the same is based on a seizure without search-warrant in contravention to the rights guaranteed to these defendants by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The motion is denied. Exception allowed.

Twelfth. The Court erred in denying the motion of the defendants for an instructed verdict of not guilty, to the denial of which motion the defendants excepted, as follows:

Mr. RAY.—Defendants now move the Court for a directed verdict of not guilty on the ground that the testimony introduced is

not sufficient in law to justify or warrant the conviction of the defendants or either of them; further, that such testimony was elicited, and by the Court permitted to be introduced in evidence over and against the objections of the defendants, and each of them, in that such testimony based upon an unreasonable search and seizure in contravention to the rights of the defendants, and besd upon a search and seizure without warrant or authority in law.

The COURT.—The motion is denied. Exception allowed. [64]

the defendant in arrest of judgment, as follows:

"Come now the above-named defendants, and each of them, by their counsel of record, and pray that no judgment be rendered against them, or either of them, upon the verdict of 'guilty' heretofore returned into court in said cause as to both said defendants, in that the facts stated in the complaint upon which said defendants were placed on trial do not constitute a crime, and are insufficiently pleaded to so constitute a crime; and, that the above-entitled Court was and is without jurisdiction to place on trial, except upon indictment by grand jury, said defendants, and each of them, for the commission of an offense which may be punishable by imprisonment for a term of more than one year."

ARGUMENT.

I. Asignments of Error II, III, IV, V, VI, VII, VIII, X and XI are predicated on the proposition that the evidence upon which a conviction was had in this case was obtained upon an illegal

search and seizure, and that the same was not admissable.

The evidence of Deputy Marshal Mossman, who made the arrest, is to the effect that the officers were driving their car along the road out of Anchorage, Alaska, when they came upon the car of the plaintiff in error, at a place where it was impossible to pass the same; that he got out of his car and went over to the car of the plaintiff in error, which had storm curtains on it; that he could see that there was something in the space between the front and rear seat; got into the car and found in there several kegs (Tr. pp. 28, 29).

Watson, another deputy United States marshal, testified that they saw some barrels in the car and that Mossman went in the car (Tr. p. 35).

Another witness for the Government testified that their car was stopped and they went and looked into plaintiff in error's car and saw there some kegs (Tr. p. 42); that Mossman went first and opened up the side curtains, it being a closed car and had curtains (Tr., p. 43).

Cadwallader, another Government witness, stated that at the place where they came upon this car it was impossible for two cars to pass (Tr., p. 47).

It will thus be seen from an examination of the evidence that the officers did not know what was in the car nor the contents of the kegs; that they simply arrested plaintiff in error upon suspicion; that there is nothing in the evidence as to plaintiff in error's actions or acts which could amount to even a suspicion. In other words, the record is absolutely silent as to the motive or reason which caused the officers to search this car.

It is plaintiff-in-error's contention that under the record the evidence was illegally seized and acquired; that plaintiff in error was compelled to supply evidence against himself and that the same was improperly admitted.

The fourth amendment to the Constitution of the United States provides:

> 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.''

The Fifth Amendment further provides:

> ''No person * * * * shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.''

This case is not unlike the case of *United States vs. Myers,* 287 Fed. 260, where the officer thought from his observation that the driver of another car was intoxicated, and drove on until he came to a bridge where he turned his automobile across it, so that the defendant could not pass. When the automobile stopped, without the consent of the owner, he opened the door of the automobile, searched it, and found liquor therein. He had no search warrant, nor did he have the owner's consent to search the car. In the present case there is no indication from the record that the officers knew or dreamed that there was any liquor in the car. There is nothing to indicate that the plaintiff in error was acting other than as an ordinary citizen. The District Court in the *Myers* case held that the evidence was illegally acquired, and that under the fifth amendment it could not be used against the defendant.

In *United States vs. Kaplin,* 286 Fed. 973, it was held that the fact of finding liquor by reason in an automobile could not justify the search.

The following cases announce the principles that we are contending for:

United States vs. Slusser, 270 Fed. 819.

Hoyer vs. State, 193 N. W. 89.

Boyd vs. United States, 116 U. S. 616.
Weeks vs. United States, 232 U. S. 383.
Amos vs. United States, 255 U. S. 313.
Gouled vs. United States, 255 U. S. 298.
Snyder vs. United States, 285 Fed. 1.
Giles vs. United States, 284 Fed. 208.
United States vs. Ovaritius, 267 Fed. 227.

The case of *Lambert vs. United States,* 282 Fed. 413, decided by this court, is not in point, for in that case the officers had evidence that the defendant was committing a crime in their presence.

II. The Court ered in permitting the admission of testimony of the witness Mossman as to the conversation had with the plaintiff in error at the time of his arrest. The record affirmatively shows (Tr., p. 38) that the officers did not warn the plaintiff in error as to his constitutional rights as to making any statement. (Assignment of Error IX.)

It is true that the witness states that it was a voluntary statement, but that is merely a conclusion of he witness. It might not have been made if the officer had warned him of his constitutional right. In any event, it was the duty of the officer to warn him as to his constitutional rights. It being admitted that he failed to do so, the Court erred in admitting the statement.

United States vs. Kallas, 272 Fed. 742.
United States vs. Bell, 81 Fed. 830.

III. The Court was without jurisdiction to try plaintiff in error upon the complaint filed, as set out in Asignment of Error I. While we are aware that this court, in *Abbate vs. United States,* 270 Fed. 735, *Koppitz vs. United States,* 272 Fed. 96, and *Simpson vs. United States,* 290 Fed. 963, has held that the Alaska Bone Dry Law is valid, it appears from an examination of these cases shows that they were decided prior to the amendment to the National Prohibition Act of November 23, 1921 (c. 134, s. 5, 42 Stat. 223), or that this amendment was not called to the Court's attention, which provides:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws taht were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act. * * *"

It will be noted that Congress in this amendment based the continuance of the then existing laws upon the one proposition that their provisions would still be in force except where such provisions were directly in conflict with any provision of the

National Prohibition Act. That the Alaska Bone Dry Law is in direct conflict with the National Prohibition Act is clear. In the present case, under the National Prohibition law, plaintiff in error could only be fined $500.00, yet the record in this case shows that he was sentenced to nine months in jail and a fine of $900.00—a direct conflict.

If this court gives to the word "all," as used in this amendment, its common, ordinary meaning, it must construe the same to mean every law, whether general or special. It means all laws passed by Congress, and both the Bone Dry Law and the Prohibition Act are such. A reading of Section 2 of the Amendment to the Constitution would indicate that this is the only construction that could possibly be given to this amendment of 1921. There it is found that concurrent power to enforce is given to Congress and the several States, not to the Territory. It is going beyond the ordinary rules of construction to say that Congress intended that there should be two sets of laws for the same act in the same Territory, with different penalties. As we understand the rules of construction, it is that where there is a conflicting penalty, the lesser should be enforced.

There is another ground upon which the Court was without jurisdiction to try this case:

Section 3550, Comp. Stat., provides that all the laws of the United States shall have the same force and effect within the Territory of Alaska as within the United States.

Section 10509, Comp. Stat., provides:

> "All offenses which may be punishable by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

The judgment in this case shows that plaintiff in error was sentenced to nine months in jail and a fine of $900.00, with the proviso, in default of payment of such fine, plaintiff in error serve a term in jail not to exceed one day for each $2.00 of such fine unpaid. It is thus apparent that plaintiff in error may be imprisoned for a term exceeding one year under this charge, and that under the Fifth Amendment to the Constitution he was deprived of his right to have his case first presented to a grand jury.

IV. Assignment 12 relates to the trial court having overruled plaintiff-in-error's motion for an instructed verdict and in arrest of judgment. If our position upon the previous assignments herein

discussed, or upon any of them, is correct, the error of the court below in refusing an instructed verdict of not guilty and in entering a judgment and sentence upon the verdict is manifest and need not be discussed.

For the erros committed we respectfully urge that plaintiff in error be granted a new trial.

Respectfully submitted,

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